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OF AN INTERNATIONAL CRIMINAL COURT
3-13 April 1995

# COMMENTS RECEIVED PURSUANT TO PARAGRAPH 4 OF GENERAL ASSEMBLY RESOLUTION 49/53 ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT

Report of the Secretary-General

Addendum

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# I. COMMENTS FROM STATES

## AZERBAIJAN

[Original: Russian]

[16 March 1995]

1. The Ministry of Foreign Affairs of the Azerbaijani Republic, on behalf of the Azerbaijani Government, welcomes the establishment of an international criminal court, which will undoubtedly promote the strengthening of international cooperation to ensure the effective prosecution and suppression of crimes which arouse the concern of the international community and pose a genuine threat to international peace and security; it finds the draft statute that has been prepared highly commendable, and has the honour to submit the following amendments to be considered for incorporation in the statute of the international criminal court.

2. In accordance with article 13 of the draft statute, the registrar and deputy registrar shall be elected by the judges on the proposal of the presidency. Thus the registry will be the sole organ of the court whose staff is not selected from among the persons designated by States. In this connection, we would propose that it is essential that the registrar and his deputy, as officers of one of the organs of the court, should be elected by the States parties on the proposal of the presidency.

3. It is important that the principles underlying the financing of the staffing of all organs of the court should be reflected in the statute. Accordingly, the statute should envisage an additional article setting out a general framework for the financing of the posts of the prosecutor, the registrar and their deputies.

4. We believe it would be useful for the draft statute to include the following wording for article 18: "The working languages of the Court shall be the official languages of the United Nations."

5. We would propose that fines should be shown in the statute not as constituting an independent form of punishment in the case of the most serious crimes, which are of concern to the entire international community, but as being additional to the penalty of imprisonment, subject to the decision of the court.

6. We would therefore propose the following wording for article 47, paragraph 1: "The Court may impose on a person convicted of a crime under this Statute penalties in the form of a term of life imprisonment, or of imprisonment for a specified number of years, with or without a fine."

CZECH REPUBLIC

[Original: English]

[22 March 1995]

## 1. Jurisdiction of the Court

1. As far as the jurisdiction ratione materiae of the Court is concerned, the draft statute is not much different, in the identification of the category of crimes covered, from the statutes of the ad hoc tribunals for the former Yugoslavia and Rwanda. These provisions are, however, more adequately formulated in the two latter statutes than in the present draft. This point especially concerns subparagraph (d) of article 20 (crimes against humanity). Not all States comprehend the term "crimes against humanity" the same way. For instance, in the Czech criminal code, the crime of genocide ranks among crimes against humanity but the draft statute treats it as a separate crime (see draft article 20 (a)).

2. Some States take the view that the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment should also be included among the treaties listed in the annex. The Czech Republic supports the opinion that a person who is accused of the crime of torture can be prosecuted for a crime against humanity according to the draft statute. It is clear, however, that not all States would agree with this view.

3. In order to prevent disputes from arising in this respect, the Czech Republic suggests two possible solutions:

(a) The draft would define crimes against humanity in a manner consistent with article 5 of the statute of the Tribunal for the former Yugoslavia;

(b) The draft would refer to the Charter of the Nürnberg Tribunal which defines the term "crimes against humanity".

4. Another difficult point is the way the acceptance of the jurisdiction of the Court has been framed.

5. The Czech Republic supports the opinion of many States that draft article 22 should be based on the principle of an obligatory jurisdiction of the Court which would be accepted ipso facto at the time a State expressed its consent to be bound by the statute.

6. The above-mentioned obligatory jurisdiction should apply to a relatively small group of crimes, which are beyond all doubt perceived by the international community as the most serious ones, such as those prohibited by the Geneva Conventions on the protection of victims of international armed conflicts.

## 2. Action by the Security Council

7. The Czech Republic considers draft article 23 a key provision of the draft statute. It is indeed the Security Council which may significantly contribute to putting the mechanism of the Court into motion. It is possible that some States will accede to the statute only for "appearance's sake" and exclude the most serious crimes from the scope of application of their declaration of acceptance.

8. The Security Council, acting under Chapter VII of the Charter of the United Nations, may frustrate such an attitude by, notwithstanding such declarations, referring a matter to the Court. It is necessary that the Council be given the discretion to refer to the Court particular situations and to leave it to the latter to decide whether prosecution should be instituted. In this regard it is necessary to mention the following legal point which is not contained in the draft statute but in our opinion undoubtedly flows from Chapter VII of the Charter: The Security Council cannot force the Court to deal with its action but can force States to bring their disputes before the Court.

## 3. Non bis in idem

9. The wording of draft article 42 of the draft statute is unacceptable.

10. The fact that an act was characterized by another court as an ordinary crime and not as a crime falling within the jurisdiction of the Court cannot provide the legal basis for a new trial before the court. Such prosecution before the Court is possible only if new facts or evidence come to light and if such facts or evidence would have influenced the decision of the court which conducted the trial.

11. A mere divergence in the legal qualification of the crime can in no way be considered as justifying the institution of new proceedings.

## SUDAN

[Original: Arabic]

[24 March 1995]

1. The establishment of an international criminal court to try individuals charged with crimes that pose a threat to international peace and security, violate basic human rights and forcibly subject others to torture in all its forms is a worthy objective sought by the international community. However, the experience of mankind in the endeavour to establish the League of Nations and subsequently the United Nations has shown that political considerations come into play in all circumstances and that facts are coloured in order to promote particular interests. The world's less powerful countries and those of lesser political, military and economic influence have thus become wary of the exploitation of global humanitarian principles and objectives to serve the purposes of some parties rather than others. Hence the concern expressed by some countries, including the Sudan, that greater opportunity should be afforded for a comprehensive review of the draft statute for an international criminal court in order to scrutinize the reservations expressed concerning certain of its provisions. We should like to affirm the importance and appropriateness of the recommendation of the International Law Commission that the court should be established by a treaty between States parties, which would ensure that Member States would not be bound by a statute imposed on them and that all States could have the option of acceding or not acceding.

2. In connection with article 6, paragraph 5, we are of the view that, in assuring the representation of the principal legal systems of the world, the representation of Islamic penal legislation as a comprehensive and independent system that is rich in human experience and is authoritative for a large number of countries should not be overlooked. An endeavour can be made to achieve this by eliminating the practice of representation on geographical lines. Moreover, Islamic penal legislation addresses issues that are at the core of the proposed articles of the draft statute, such as the extradition of offenders. The exclusion of capital punishment from the penalties to be applied by the court would mean the partial abandonment of the principle of retaliation stipulated in Islamic law and would deprive the court of the ability to impose a penalty befitting the crime committed. This is particularly relevant since the crimes the court is to punish are of a kind to stir the conscience of mankind and disturb its tranquillity.

3. In connection with article 19, concerning the rules of the court, we consider that the stipulation should be made that such rules should be considered and approved by Member States since they may deal with substantive and procedural issues of far-reaching effect. The possibility of the provisional application of rules, as stipulated in article 19, paragraph 4, should be subject to the control that it would not be possible to give effect to rules in a case being considered by the court at the same time as the rules are issued, in order to eliminate the suspicion of a connection between the rules and any interest in a case that is under investigation or being tried.

4. Our view of article 20, on crimes within the jurisdiction of the court, is that the conduct and practices of certain States, particularly in the Security Council, give rise to the concern expressed by many States with regard to the intervention of political factors in the definition of crimes, violations and aggression and in the pursuit of suspects. There is justification for such concern, and there must therefore be a more precise definition of the crimes falling within the jurisdiction of the court. The Sudan is not a party to the Convention on the Prevention and Punishment of the Crime of Genocide, which gives a loose definition of this crime. We also regard the formulation "crimes against humanity" in article 20 (d) as loose, as extending to other "inhuman" acts and as including practices prohibited by the International Labour Code, which the Sudan has approved, such as forced labour, slavery and the expulsion or forcible displacement of populations.

5. The qualification introduced in article 20 (e), which is a further limitation to the jurisdiction of the court under the relevant treaties, is a desirable one since it affirms the principle that the international criminal court complements and does not replace the role of national courts.

6. In drafting article 22, the Commission has succeeded in avoiding a possible source of concern by excluding the crime of genocide, as in article 21, where the complainant State is not required to accept the jurisdiction of the court. As previously stated, the Sudan is not a party to the Genocide Convention, but article 22 has been formulated in such way as to permit a State such as the Sudan, should it wish to do so, to request the court to exercise its jurisdiction in a case that concerns it and is included under the definition of genocide. In our estimation, this is a positive aspect.

7. The exceptions to the principle of non bis in idem that are set forth in article 42 deprive the principle of its fundamental character and make it subject to political vagaries and whims. The article, and particularly its paragraph 2 (a), should be amended in order to reinforce the principle, since the characterization by the court of the acts in question may itself constitute a judgement that the acts performed do not constitute a crime over which the court has jurisdiction. This in itself is not a blemish that would permit an exception to this established legal principle. The authority of national courts and hence the national sovereignty of States would be prey to crude interpretations by means of which the principle could be violated. The introduction of the principle of review would be more appropriate than retrial, so that the rule of res judicata would be a definitive principle in all cases.

8. According to article 23 of the draft statute, the Security Council would be able to initiate proceedings and to refer matters to the court without regard for a State's acceptance of the jurisdiction of the court. In this connection, a number of reservations are necessary:

(a) Political considerations would have an evident role in directing the work of the court, which is ultimately a legal body of the most impartial kind. The Security Council might make use of this article to coerce particular States and to impose particular conditions. The Council has increasingly become an instrument for conferring international legitimacy on situations that clearly serve particular interests. The adoption of this article in its present form

would therefore perpetuate a situation from which the international community is striving to extricate itself and which represents a crisis for democracy and equality between States at the United Nations.

(b) The Security Council could exploit this article in order to use a system adopted by the international community under a treaty among States parties (the international criminal court) in order to censure particular individuals. This could lead to humiliation for some countries and could offend their national dignity, particularly if the individuals concerned assumed a political stance opposed to the will of the members of the Security Council and especially of those with the right of veto. Despite the assurance given in the commentary by the International Law Commission that the Security Council would not refer to the court a "case" against individuals but only a "matter", the entire situation could be a procedural arrangement by which the Council would refer the "matter" to the court and the procuracy of the court would undertake to prosecute the person concerned in the "matter".

9. Despite the foregoing and in view of the actual situation and the expanding role of the Security Council and its power to impose its will on other States through the provisions of Chapter VII of the Charter, it would appear to be impractical to deny the Council any role at all with respect to the court and to do so would weaken the court's authority. That there should be a linkage between the statute of the court and the United Nations is therefore a practical, principled and judicious position, but a means of control must be devised such as the participation of the General Assembly and the Security Council in establishing particular legal conditions for the referral of cases.

10. There is a need to ensure that the judges of the court's trial chambers and appeals chamber should represent the various principal legal systems, particularly where the case presented involves parties that come from one of these systems. Article 6, paragraph 5, stipulates that States parties should bear in mind in the election of the judges that the representation of the principal legal systems of the world should be assured. This stipulation does not, however, appear in article 9, which deals with the chambers of the court, and it might perhaps be appropriate to amend that article in order to provide for such representation.

11. The various principal legal systems must also be represented in the procuracy and particularly at the deputy prosecutor level. Article 12, paragraph 2, concerning the procuracy, should perhaps therefore be amended to provide that the deputy prosecutors should represent different legal systems instead of simply being of different nationalities.

12. A formulation must be found to remove the inconsistency in article 20 (e) concerning imposition of acceptance of the jurisdiction of the court on States parties when they are not parties to the treaties listed in the annex to the draft.

13. Article 23, paragraph 1, which grants the Security Council the power to determine on behalf of the court its jurisdiction in certain crimes referred to it by the Council, must either be amended or the court must have the deciding voice in accepting or rejecting a case referred to it by the Council. In other

words, the court must have the inherent power to decide on its jurisdiction. This may be by reference to article 24, which gives the court the right to determine that it has jurisdiction in any case brought before it.

14. We also endorse the view expressed by members of the International Law Commission that article 23, by bringing in the Security Council, would introduce into the statute a substantial inequality between Member States and that thus the preferable course would be for the article to be moved and to be included as a "savings clause" in the preamble to the effect that nothing in the statute should affect the authority of the Charter of the United Nations. (See Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), paragraph (15) of the commentary to article 23.)

15. In another respect, all those provisions must be eliminated from the draft statute that oblige States parties to accept the jurisdiction of the court (such as inherent jurisdiction in the case of the crime of genocide) with regard to treaties to which the States concerned are not parties. We support the view that article 51 of the draft statute should be amended to lessen the obligation imposed on States parties and to accord them greater flexibility with respect to that obligation. (See document A/49/10, paragraph (3) of the commentary to article 51.)

16. We support the view expressed in the study that the court should be established by a treaty and that it should conclude an agreement with the United Nations or its organs determining the nature of the relationship between them.

17. We agree with the principle of "opting in" to the jurisdiction of the court as the soundest means of ensuring the respect of States parties for the court and their compliance with the judgements issued by it, since in this case States undertake in advance to be bound by the jurisdiction of the court in specific matters.

18. We are also of the view that the basic provisions relating to procedures and rules of evidence contained in the rules of the court should make use of the various principal legal systems, including Islamic penal legislation, which, in our view, provides guarantees to the victim and the accused that are seldom found in other systems.

## II. COMMENTS FROM RELEVANT INTERNATIONAL ORGANS

### CRIME PREVENTION AND CRIMINAL JUSTICE BRANCH AND UNITED NATIONS INTERNATIONAL DRUG CONTROL PROGRAMME

[Original: English]

[24 March 1995]

### 1. Introduction

1. The Crime Prevention and Criminal Justice Branch (CPCJB) of the United Nations Office at Vienna and the United Nations International Drug Control Programme (UNDCP) have followed the work of the International Law Commission with intense interest. The Commission on Crime Prevention and Criminal Justice (CCPCJ) 1/ has expressed interest in the development of an international criminal court, supporting the endeavours of the International Law Commission in that direction. The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, 1990), in its resolution 25, 2/ stated that the work of the International Law Commission on the codification of international criminal law should be encouraged and that the Commission should continue to explore the possibility of establishing an international criminal court.

2. Pursuant to General Assembly resolution 49/53 and the relevant request of the Legal Counsel, UNDCP and CPCJB have reviewed the draft statute for an international criminal court contained in the report of the International Law Commission on the work of its forty-sixth session. 3/ The review was carried out in the light of the legislative mandates of both bodies and from the point of view of their substantive competence. In this context, the draft statute is deemed to be quite comprehensive and to cover a wide variety of the issues that are bound to arise in any discussion involving an international criminal jurisdiction. It was always kept in mind that criminal jurisdiction is fundamental to the national sovereignty of States, that there is a multitude of different legal systems, which need to be taken into account, and that there are serious questions of the procedures that would guarantee basic rights of the parties in criminal proceedings that need to be addressed. The work of the International Law Commission in balancing all these issues has been commendable. There are, however, a number of issues that still remain to be resolved in order to ensure that an international criminal court will be in a position to fully exercise its mandated functions. These issues are both substantive and procedural and are of significant importance to the work of both the Commission on Narcotic Drugs and CCPCJ.

### 2. Substantive questions

3. Many countries, particularly those that are developing or in transition, are experiencing considerable difficulties in preventing and controlling crimes that transcend national borders. During the last decade, criminal organizations have grown exponentially and have acquired resources that exceed the gross national product of many nations. Along with this wealth comes the ability to

intimidate, corrupt and directly threaten institutions and individuals alike. Criminal organizations have the ability to obtain the best available human resources and to carry out their operations in an increasingly sophisticated manner. These operations extend beyond borders and are undertaken in different countries. Criminal organizations not only diversify their activities in response to opportunity for increased profits, but also target countries with inadequate resources or weak institutions that present a lesser risk. Organized illicit drug trafficking is a prime example of an activity that puts an enormous burden on law enforcement and judicial authorities and strains the resources of even developed nations. An international criminal court has been viewed by many States as a much-needed solution to the problems that their criminal justice systems face.

4. The draft statute does not appear to adequately address these concerns. Article 20, in specifying the crimes over which the Court will have jurisdiction, does not extend to modern organized transnational crime, with the exception of drug-trafficking offences under the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. 4/ The international community has expressed its grave concern about organized transnational crime in all its forms on numerous occasions. Most recently, the World Ministerial Conference on Organized Transnational Crime, held at Naples from 21 to 23 November 1994, emphasized the need for intensified international cooperation and action at all levels against these forms of crime. The Conference adopted the Naples Political Declaration and Global Action Plan against Organized Transnational Crime, 5/ later approved by the General Assembly in its resolution 49/159, of 23 December 1994, in which the international community undertook the commitment to combat organized crime at all levels. The draft statute should confer jurisdiction upon the Court on a broader range of organized criminal activity to assist in the efforts of the international community to take effective action against this form of crime.

5. Although the inclusion of drug-trafficking offences as defined in article 3 of the 1988 Convention will greatly enhance international efforts to combat organized transnational crime, substantial ambiguity arises from the provisions of draft article 20 (e). In particular, the issue of how it will be determined what drug-trafficking offences constitute exceptionally serious crimes of international concern will need further elaboration. In approaching this matter, consideration will have to be given to the provisions of the 1988 Convention which define certain offences as grave, the implication of the Convention for national legislation, as well as the approach taken by States. While the principle of the severity of the offence is sound in view of the need to address the multitude of activities engaged in by organized transnational criminal groups, further elaboration is needed in the light of the differing national perceptions of the severity of individual offences. A more concrete standard, such as the degree of organization involved, would assist in striking a balance between the need for the Court to alleviate the burden on the criminal justice systems of small or developing countries, while making the best use of scarce resources.

6. Another matter that might require more careful consideration is the applicable substantive law. This may be particularly relevant in illicit drug-trafficking cases, where the penalties imposed by national legislation for

similar conduct vary considerably. The Court would be required to set a standard of consistency in dealing with those cases, to avoid unequal treatment deriving from the application of different national laws. In the event that the jurisdiction of the Court is extended to cover other organized transnational crimes, the question of applicable law assumes greater importance, in view of the fact that national laws are still evolving.

7. The commentary to the draft statute shows that the International Law Commission considered terrorism in the context of determining the crimes that would fall under the jurisdiction of the Court. Endeavours to define terrorist acts continue in various forums, including in the Sixth Committee of the General Assembly, but with little progress. It should be pointed out that the international community in the Naples Political Declaration noted with grave concern the links between organized transnational crime and terrorist crimes.

8. Organized transnational crime, including large-scale illicit drug trafficking, almost always involves many States. A crime may be committed in more than one country, the perpetrators may be nationals of other countries and the proceeds may be laundered through yet other countries. Article 21 of the draft statute requires acceptance of the Court's jurisdiction by "the State on the territory of which the act or omission in question occurred". The question arises whether, in the forms of crime described above, consent might be needed from several States all of which have been affected by the acts constituting the offence. Consideration would have to be given to the interests of the States involved, the possible impact on those interests if the Court exercises jurisdiction because of the principle of non bis in idem, as well as to mechanisms to ensure that full cooperation from all States concerned is forthcoming.

9. Regarding the referral of a case to the Court, its acceptance of jurisdiction, obtaining the presence of the alleged offender and obtaining evidence, consideration might be given to the model treaties on Extradition, Mutual Assistance in Criminal Matters and the Transfer of Proceedings, adopted by the General Assembly on 14 December 1990 on the recommendation of the Eighth Congress, in resolutions 45/116, 45/117 and 45/118 respectively. Draft manuals on reliance on the first two of these model treaties are available in Vienna.

## 3. Procedural questions

10. A number of important procedural matters have been addressed by the International Law Commission, evidencing its awareness of the importance of a body of procedural rules that would ensure the fair administration of justice. The draft statute itself does not comprehensively cover procedural matters, mainly because the approach adopted has been to delegate to the Court the elaboration of its own rules. There are, however, certain key issues that may have to be further considered, particularly in view of the substantive jurisdiction of the Court.

11. In this connection, it may serve a useful purpose for the Ad Hoc Committee to develop a framework in the context of which the Court can develop its procedures. Such a framework could consist of arrangements for evidentiary

rules, procedures for the protection of witnesses, the pre-trial custody of the accused, the execution of the penalties and the modalities for the exercise of the right to counsel. In this regard, the United Nations standards and norms for crime prevention and criminal justice, developed in the context of the crime prevention and criminal justice programme, might serve as a useful guide. The text of these standards and norms is contained in a Compendium, published by CPCJB. 6/

## 4. Administrative questions

12. Closely related to the substantive issues raised above is the question of truly adequate resources for a court which must adjudicate crimes that are highly complex, large-scale, often violent and invariably involve multiple jurisdictions. They are perpetrated by well-organized, sophisticated criminals who have vast resources at their disposal. The investigation and the prosecution of such offences require highly skilled criminal justice professionals and are often a lengthy process. Those professionals must be protected from intimidation. In addition it will be necessary to have mechanisms for the protection of witnesses and their families from intimidation and violence. Because of the transnational nature of these crimes, substantial resources may be necessary to gather evidence.

13. Another question to which considerable attention was devoted in the International Law Commission was the question of whether the Court would be permanent or ad hoc. While recognizing that it may take some time for an international criminal court to develop a full case-load, and fully cognizant of the resource implications, it seems preferable that at least a permanent core be established. This would ensure consistency, continuity and the accumulation of knowledge and expertise, as well as the ability to respond promptly to particularly pressing situations. The existence of all these attributes would serve to build confidence among States in the Court's competence and ensure the integrity of the process.

## Notes

1/ See Economic and Social Council resolutions 1992/22 and 1993/34.

2/ Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990 (United Nations publication, Sales No. E.91.IV.2), chap. I.C, resolution 25, annex, paras. 30-31.

3/ Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), para. 91.

4/ E/CONF.82/15 and Corr.2.

5/ A/49/748, annex, chap. IV.A.

6/ Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice (United Nations publication, Sales No. E.92.IV.1).

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